A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals

Administrative review involves the reconsideration of an administrative decision by a different official within the same public body. Administrative review has operated in various contexts for years, but the rate of its recent expansion has been remarkable. Two systems have been key to this rapid growth. The introduction of 'mandatory reconsideration' in social security decision-making requires that benefit claimants must first seek administrative review before appealing to a tribunal. In immigration, long-established appeal rights have been replaced entirely by administrative review. The volume of disputes channelled through administrative review far exceeds that of tribunals and makes judicial review appear esoteric. This is a radical change to how people access and experience justice in the public law context. For the last fifty years and more, individuals in receipt of a negative administrative decision could appeal directly to independent and judicial tribunals to determine their legal rights and entitlements to social security benefits and immigration status. The rationale for this fundamental shift is clear: the increase in tribunal caseloads, austerity, and political factors (the desire to reduce social security spending and immigration rates) have prompted the Government to reduce the number the cases proceeding to tribunals by greater use of administrative review. Within the longer arc of administrative justice developments, we suggest that administrative review can be conceived as a consequence of the government's own progressive judicialisation of tribunals—and the related increases in both cost and time. Government departments have argued that administrative review can provide people with an efficient and quicker way of correcting case-working errors and thereby reducing unnecessary appeals. On the other hand, there are concerns about the effectiveness of administrative review as a redress mechanism and whether it weakens the ability of people to challenge decisions.

This article argues that administrative review – as it currently operates - is a problematic response to the judicialisation of tribunals in recent decades. The overall effect of the operation of

administrative review has been to weaken the ability of people to secure redress against administrative decisions. The first part discusses the need for justice within administrative decision-making and the development of tribunals. The second part turns to the recent expansion of administrative review. The third part considers the practical operation of administrative review in both the social security and immigration contexts. In the fourth part, we assess administrative review and suggest ways of enhancing its effectiveness. We conclude by considering the wider constitutional implications of this development of administrative review. In particular, we suggest this episode of de-judicialisation provides insight into nature of judicial power in the UK public law system. In contrast to the standard, high-profile debate about the growth of judicial power and the rise of "juristocracy", the recent experience of administrative review tells a different tale. The greater use of administrative review has gone hand-in-hand with a correspondingly smaller role for the judicial control of government.

Administrative decision-making and the judicialisation of tribunals

The basic need for administrative justice begins with primary administrative decision-making and its impact upon people. Justice within initial-decision is the most important form of justice in terms of volume. All decision-making starts – and most of it finishes – here. Government departments, such as the Department for Work and Pensions (DWP) and the Home Office make millions of individualised decisions each year to determine people's entitlements and to implement policy. Such bodies are variants of a particular organisational model: the machine bureaucracy. That is, a large heavily-staffed organisation that undertakes a vast number of repetitive operating tasks through routinized and formalised procedures.[1] The basic legitimating value of this model is the ability to process a massive volume of decisions efficiently and accurately. Given their technical superiority, administrative

[1] H. Mintzberg, *The Structuring of Organizations* (Englewood Cliffs, N.J.: Prentice-Hall, 1979), pp.314-347. Cf. Mashaw's model of 'bureaucratic rationality': J. Mashaw, *Bureaucratic Justice: Manging Social Security Disability Claims* (New Haven: Yale University Press, 1983), pp. 25-26.

bureaucracies are often the only viable means of managing large-scale social issues and for implementing democratically-mandated policy goals.[2]

The ideal model of machine bureaucracy assumes the rational, accurate and efficient implementation of policy. In practice, administrative bureaucracies are often afflicted by dysfunctional behaviour, which constrains their capacity to make robust decisions. Government agencies are subject to intense political pressures, overwhelmed with individualised decision-making, and are administratively unstable. These dysfunctional aspects often have tragic consequences for those who interact with government. Caseworkers have to make complex, sensitive, and morally-demanding decisions that are often life-changing for the individuals involved.[3] For instance, is a benefit claimant unable to work for health or disability reasons? Is a foreign national entitled to leave to enter to join a family member already present in the UK? Yet, government bodies frequently operate in an impersonal, bureaucratic, and rule-bound manner. The often 'byzantine complexity' of administrative rules reflects a hyper-legalism in which their frequent misapplication is inevitable.[4] Weighed down by the both the volume of decisions they have to make and processing targets, caseworkers often apply the rules not as a means to an end but as an end in themselves. The mechanical application of the rules to a wide variety of citizens and circumstances can result in arbitrary, insensitive, and incorrect decisions. Mistakes and errors may arise either because of unintentional carelessness, oversights, and communication issues or from ill-intentioned bias.

The variable or poor quality of administrative decisions and their implications for claimants is a long-standing theme of administrative justice.[5] Representatives and advocacy groups have frequently criticised the poor quality of government decisions. Recent tribunal decisions illustrate the

[2] Government does not have a monopoly of decision-making. Over recent years, government has increasingly outsourced functions to private providers to reduce costs. For instance, health care professional reports used in benefit decision-making are produced by private providers.

[3] B. Zacka, *When the State Meets Street* (Harvard University Press, Massachusetts, 2017).

[4] *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [4] (Jackson LJ), on the complexity of the Immigration Rules.

[5] N. Wikeley, 'Future Directions for Tribunals: A United Kingdom Perspective' in R. Creyke (ed.), *Tribunals in the Common Law World* (Sydney: Federation Press, 2008), pp.175-184; Administrative Justice and Tribunals Council, *Right First Time* (2011).

mix of intense concern and bafflement at chaotic procedures and poor decisions: '[e]very working day, the First-tier Tribunal overturns decisions of the Secretary of State because the decision maker has omitted to consider all the relevant issues;[6] '[y]et another case in which the removal of an award of the Personal Independence Payment was not dealt with in any sense adequately';[7] 'yet another case in which the putative appellant and the First-tier Tribunal was misled by HM Revenue & Customs and its defective procedures … A combination of Kafka and Captain Mainwaring might be thought unlikely to come up with such a sorry state of affairs.'[8] Similarly, immigration decision letters frequently 'do not sufficiently rely on the law and guidance' relevant to the decision.[9] Clearly administrative performance varies, but at its worst poor service includes inflexible attitudes, incomprehensible decision letters, aggressive enforcement, and downright incompetence. The need for effective control of machine bureaucracies, and redress for those subject to their decisions, is clear.

For the last century and more, the principal remedy for challenging routine administrative decisions has been to allow affected individuals to appeal to tribunals. The overarching ethos of tribunals has long been swift, inexpensive, and uncomplicated access to justice. The task of tribunals is to undertake a full examination of the merits of a claim, whether for benefits or an immigration status. Unlike when courts conduct judicial review, tribunals exercise a fact-finding function and can substitute their own decisions. An equally important feature of tribunals is their emphasis upon adjudication not just as a procedure, but their cultural insistence on an impartial and judicial state of mind, consistency, and the careful collection and analysis of evidence.[10] Given the impact of decisions

[6] *RR v Secretary of State for Work and Pensions* (JSA) [2017] UKUT 50 (AAC), [39].
[7] *PM v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 37 (AAC), [1].
[8] *DG v HMRC and EG* (TC) [2016] UKUT 505 (AAC), [1]-[2]. See also *JW v HMRC* (TC) [2015] UKUT 359 (AAC), [1]: 'yet another case that falls into the litany of cases in which the dreadful quality of HMRC's appeal response to the First-tier Tribunal is a central issue'.
[9] House of Lords Constitution Committee, *The Legislative Process*, 16 November 2016, Oral evidence of Sir Ernest Ryder (Senior President of Tribunals), Q 44.
[10] W.A. Robson, *Justice and Administrative Law* (London: Stevens & Sons, 3rd edn., 1951), pp.360-418; J. Jowell, 'The Legal Control of Administrative Discretion' [1973] P.L. 178, 194-200. For the perspective of a tribunal judge, see N. Warren, 'The Adjudication Gap' (2006) 13 J.S.S.L. 110.

upon people, the exercise of sound judgement is at the heart of adjudication. Another crucial feature is the ability of affected persons to participate directly in the decision process.[11]

Tribunals naturally appeal to a different set of values than bureaucratic administration: judicial independence; fair procedures; and better-reasoned decisions. Furthermore, administrative decision-making processes operate in the context of an unequal relationship between claimants and government. 'One-shotter' claimants go up directly against 'repeat-player' public bodies which operate large, monolithic, and monopolistic processes.[12] The latter benefit not just from experience of the system, but also influence its design.[13] Given this fundamental inequality, tribunals provide a counterweight to the routinised, rigid, and impersonal processing of decisions. In hearings, tribunals meet claimants face-to-face and use their expertise and inquisitorial procedures to draw out evidence from claimants in order to exercise complex judgment. Just as importantly, given that their vulnerable clientele are often intimidated by the prospect of legal procedures, tribunals try to cultivate an atmosphere in which claimants could feel confident about explaining personal aspects of their lives. It is important to note that tribunals do not themselves dispense uniformly high standards of justice: tribunals are far from perfect. There have been instances of glaring failures by tribunals to act fairly and in accordance with legal principles. Some have a tendency to be highly adversarial and some tribunals hearings are significantly delayed. Moreover, in recent year the courts have been questioning the fairness of some appeals procedures, such as out of country appeals in the immigration context.[14] Nonetheless, generally speaking, adjudication by higher qualified tribunal judges results in a higher standard of decision-making compared with that of pressurised front-line, often junior caseworkers.

[11] Tribunals, Courts, and Enforcement Act 2007, s 2(3) and the overriding objective in tribunal procedure rules, e.g., The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules (SI 2008/2685), r 2.
[12] M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.
[13] V. Bondy and A. Le Sueur, *Designing Redress: A Study About Grievances Against Public Bodies* (2012).
[14] *R (Kyarie and Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380.

The development of tribunals both individually and collectively is not easily summarised, but a prominent and sustained theme has been judicialisation.[15] This trend has had various features: increasingly complex substantive rules; the appointment of legally qualified personnel as tribunal judges; greater use of representatives; orderly procedures; reasoned decisions; and onward appeals.[16] This trend culminated in the creation of the First-tier and Upper Tribunals. Designated as a superior court of record, the Upper Tribunal is recognised as a specialist and expert body.[17] The gradual judicialisation of the tribunals system in recent decades has been largely led and approved by successive governments. It is also important to note that judicialisation was not an unmitigated good—indeed it is a 'profoundly ambiguous device'.[18] Making tribunals more like courts can undermine their distinctive role. Legalistic procedures can limit the degree to which claimants can participate in proceedings. Complex legal rules and Upper Tribunal precedents are often impenetrable. Nonetheless, judicialised procedures have, on the whole, provided advantages for claimants in terms of fair process and legal accuracy.[19]

Despite being a creature largely of its own creation, judicialisation raises a different set of concerns for the government—namely cost, delay, and the frustration of ultimate political objectives. Since the Franks Report of 1957, the speed and cheapness of tribunals have been their principal attractions for government.[20] Even before the financial crisis of 2007/08, the Government framed the discussion of tribunals, and administrative justice more broadly, around the concept of 'proportionate

[15] G. Drewry, 'The Judicialisation of "Administrative" Tribunals in the UK: From Hewart to Leggatt' (2008) 28 *Transylvanian Review of Administrative Sciences* 45; R. Thomas, 'Current Developments in UK Tribunals: Challenges for Administrative Justice' in S. Nason (ed.), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press, 2017).

[16] C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd edn., 2009), p.490.

[17] Tribunals, Courts and Enforcement Act 2007, s 3(5); *R. (Cart) v The Upper Tribunal* [2012] 1 AC 663 [40]; *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678; *Jones v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] 2 AC 48; R. Carnwath, 'Tribunal Justice—A New Start' [2009] P.L. 48.

[18] T. Prosser, 'Poverty, Ideology, and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors' (1977) 4 *British Journal of Law and Society* 39, 58.

[19] There is a much wider debate here. See N. Wikeley, 'Burying Bell: Managing the Judicialisation of Social Security Tribunals' (2000) 63 M.L.R. 475.

[20] *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218,1957) (the Franks report).

dispute resolution'.[21] In practice, tribunal procedures, with their (current) heavy reliance on paper documents and hearings, are complex, drawn-out, and inefficient.[22] However, as part of its austerity policies, government has imposed large-scale reductions in funding in the justice system. Much of the current crisis in access to justice stems in large part from legal aid restrictions.[23] Previously, legal aid had been available for advice (in social security tribunals) or advice and representation (immigration tribunals), but it is now largely unavailable[24] prompting the familiar problem of how litigants in person can be expected to navigate and participate in a legal process.[25] Yet, the Coalition Government (2010-15) and the subsequent Conservative governments have focused on reducing public spending and have viewed tribunals as both overloaded and costly. Appeal fees have been introduced across a range of tribunals, though some have been found to be unlawful and some planned fee increases have been abandoned.[26] These restrictions, combined with the abolition of the Administrative Justice and Tribunals Council, have weakened the quality of administrative justice.[27] The main response of the Ministry of Justice to such concerns has been to announce a programme of court and tribunal reform that will introduce digital and online dispute resolution methods into tribunals.[28] In the meantime, government departments have expanded the use of administrative review.

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[21] Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, 2004); M. Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 M.L.R. 958.

[22] HM Courts and Tribunals Service is currently implementing a digitisation reform programme under which tribunal cases would largely be conducted online. See Ministry of Justice, *Transforming Our Justice System* (2016).

[23] E. Palmer, T. Cornford, A. Guinchard, and Y. Marique (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart, 2016).

[24] Legal Aid, Sentencing and Punishment of Offenders Act 2012. In the immigration context, legal aid remains available only for asylum and bail cases.

[25] *The Judicial Working Group on Litigants in Person: Report* (2013); H. Genn, 'Do-it-yourself Law: Access to Justice and the Challenge of Self-representation' (2013) 32 C.J.Q. 411; JUSTICE, *Delivering Justice in an Age of Austerity* (2015).

[26] Ministry of Justice, *Court and Tribunal Fees* (Cm 9124, 2015); House of Commons Justice Committee, *Courts and Tribunals Fees* (HC 167 2016-17); *R (Unison) v Lord Chancellor* [2017] 3 WLR 409.

[27] Administrative Justice and Tribunals Council, *Securing Fairness and Redress: Administrative Justice at Risk?* (2011); M. Adler, 'The Rise and Fall of Administrative Justice – A Cautionary Tale' (2012) 8 *Socio-Legal Review* 28; N. O'Brien, 'Administrative Justice: A Libertarian Cinderella in Search of an Egalitarian Prince' (2012) 83 *Political Quarterly* 494. A new privately-backed Administrative Justice Council has now been set up between HMCTS and JUSTICE, a non-governmental organisation.

[28] Ministry of Justice, *Transforming Our Justice System* (2016) 15. For discussion on the progress of these reforms so far, see: National Audit Office, *Early progress in transforming courts and tribunals* (2017-19 HC 1001). For

Administrative review

Illustrating the fragmented administrative justice landscape, administrative review schemes have developed on an *ad hoc* basis. Indeed, from one perspective, 'administrative review' is a catch-all phrase to cover a wide miscellany of systems. In the context of the Social Fund (abolished in 2013), there operated a distinctive scheme under which initial decisions were reviewed by a functionally separate body, the Independent Review Service. Despite its controversial origins, this scheme developed a strong reputation for providing an independent, expert, timely, and high quality service.[29] Since 2009, tax decisions can been challenged either by way of administrative review or tribunal appeal.[30] In 2011, school exclusion appeals were downgraded to review panels.[31] Administrative review also operated at the preliminary pre-protocol stages of judicial review litigation in which many claims are settled out of court.[32] Tables 1 and 2 provide detail on social security and immigration reviews and appeals.

discussion on tribunals reform in particular, see: R. Thomas and J. Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (Public Law Project and UK Administrative Justice Institute, 2018).

[29] Social Fund Commissioner, *Annual Report 2012/2013* (2013).

[30] The Transfer of Tribunal Functions and Revenue and Customs Appeals Order (SI 2009/56).

[31] Education Act 2011, s 4.

[32] V. Bondy and M. Sunkin, 'Settlement in Judicial Review Proceedings' [2009] PL 237.

Table 1: Administrative review schemes

	Social Security	Immigration
Basic design	Administrative review is mandatory before proceeding to a tribunal	Administrative review has replaced most appeal rights
Who reviews?	A different decision-maker	A different decision-maker
Legal basis	Secondary legislation	Immigration Rules and administrative guidance
Time limit for requesting review	30 days, with scope to extend for good reason; can appeal to a tribunal if request to extend is refused[33]	28 days for overseas decisions; 14 days for decisions taken in the UK; 7 days for detainees
Scope of review	Revision on any grounds: to reconsider the decision afresh	To resolve case-working errors
Review procedure	Paper-based. Reviewers may telephone claimants to explain decisions and collect additional evidence	Paper-based
Range of evidence considered	Additional evidence can be submitted	Additional evidence cannot be submitted
Fee	No fee	£80 fee (refundable)
Deadline for public authority to undertake reviews	No formal deadline; straightforward cases expected to be completed within 14 days	No formal deadline; service standard of 28 days to complete reviews
Onward route of challenge	Tribunal appeal on both fact and law	Judicial review
Sporadic inspection	Social Security Advisory Committee (2016)	Independent Chief Inspector of Borders and Immigration (2016) and (2017).
Continuous Independent oversight	None	None

[33] The route to appeal was established by an Upper Tribunal ruling and not the DWP itself: *R(CJ) and SG v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC).

Table 2: Comparison of social security and immigration administrative reviews and tribunal appeals, 2015-16[34]

	Volumes		**Unit costs**		**Average clearance times**		**Proportion of successful challenges**	
	Administrative reviews (2017/18)	Appeals (2015/16)	Administrative reviews	Tribunal appeals	Administrative reviews	Tribunal appeals	Administrative reviews	Tribunal appeals
Social security	317,000	178,818	£80	£592	13 days	125 days	15 per cent	61 per cent
Immigration	7,000 in-country reviews [35]	52,514 tribunal appeals; 10,000 judicial reviews	N/A (estimated cost: £80)	£707	15 days	230 days	18 per cent	49 per cent

The intention is that, by filtering our clearly wrong decisions, administrative review will reduce unnecessary tribunal appeals and the associated costs and delays. Furthermore, it is argued that administrative review will provide a more efficient and user-friendly redress mechanism than that offered by increasingly legalistic tribunals, especially in areas of mass administration. There are also arguments for administrative review from the perspective of claimants. Research into user experiences of administrative justice systems has found that people attach great importance to the timely resolution of disputes.[36] Vulnerable people who may dispute benefit decisions likely have an acute social need. A legal model that situates claimants and public authorities as adversaries is unlikely to assist those with urgent social needs By contrast, a swift review by the public body has considerable advantages in terms of ease and efficiency and providing a better way to resolves informally without the anxiety of a hearing. For instance, a student visa appeal may take months to be heard—and

[34] Ministry of Justice, *Tribunals Statistics Quarterly* (2017); DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (2017); DWP, *Personal Independence Payments: Official Statistics* (2017); FOI 106180; FOI 106568; FOI 40166.

[35] The Home Office does not collect data on administrative reviews submitted by claimants overseas and those in immigration detention.

[36] A. Bryson and R. Berthoud, 'Social Security Appeals: What Do the Claimants Want?' (1997) 4 J.S.S.L. 17; G. Richardson and H. Genn, 'Tribunals in Transition' [2007] P.L. 116, 123.

conclude long after the start of the academic year—whereas an administrative review can take 15 days.

The lower costs of administrative review arise from procedural differences. In tribunals, appellants attend hearings before a legally qualified tribunal judge and, in some appeals, a non-legal member (or members). By discarding costly and lengthy judicial procedures, administrative review can handle a large caseload more quickly and efficiently. Tribunal judges specialise in particular areas of administrative law whereas non-legal members bring other specialist skills, such as medical knowledge. Tribunals draw out evidence actively, through either inquisitorial or 'enabling' procedures for unrepresented appellants or more adversarial hearings with represented claimants.[37] They also issue detailed reasons and decisions that can be appealed to the Upper Tribunal. By contrast, administrative review is a predominantly paper-based process typically undertaken by relatively junior officials. The reviewer will typically consider only the evidence previously submitted. In some contexts, such as social security, reviewers may contact claimants over the telephone to explain the initial decision and collect further information. Another difference is that appeals involve a complete assessment whereas administrative review is typically limited to correcting case working errors.[38] Beneath these formal differences lie differing cultural orientations and presuppositions between independent tribunal judges and reviewers located firmly within the administration.

[37] According to an Upper Tribunal judge, the enabling role of social security tribunals has been described as their 'unique selling point': S. Wright, 'The Impact of Austerity and Structural Reforms on the Accessibility of Tribunal Justice' in Palmer et al, no 24 above. By contrast, immigration tribunals are more adversarial. See generally R. Thomas, 'From "Adversarial v Inquisitorial" to "Active, Enabling, and Investigative": Developments in UK Tribunals' in L. Jacobs and S. Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Farnham: Ashgate Publishing, 2013), p.51.

[38] There is no coherent approach as to the scope and grounds of administrative review. Immigration reviews are concerned with 'case working error' (Immigration Rules, AR2.1). Homelessness reviews focus on a 'deficiency or irregularity in the original decision' (The Allocation of Housing and Homelessness (Review Procedures) Regulations (SI 1999/71), r 8(2)). Social security mandatory reconsiderations focus on 'official error' and 'mistake of fact' (The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (SI 2013/381), r 9)). As regards tax reviews, 'The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances' (Taxes Management Act 1970, s 49E(2) as inserted by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order (SI 2009/56)).

The debate over whether the expansion of administrative review is positive or not has largely fallen into two camps: traditional scepticism and a more sanguine view. In 1989, the Council on Tribunals stated that where an administrative decision affects a citizen's liberty, livelihood, status or basic rights, then nothing less than an appeal to a properly equipped judicial and independent adjudicative body would suffice.[39] On this view, any attempt to compromise the status of appeals in whole or in part on resource grounds would be wrong in principle. Furthermore, given its lack of institutional independence, administrative review could not 'in any sense be regarded as a proper substitute for a right of appeal'.[40] By contrast, the 2001 Leggatt review of tribunals argued for the systematic use of administrative review to ensure that only the right cases would be taken to tribunals. Administrative review could be used to avoid the costs and stress of appeals and enable senior and experienced officers to identify problems in the system.[41] According to Leggatt, administrative review would be a 'valuable way of improving service to the public'—if public bodies looked at their own decisions critically and adopted the 'kind of independent-mindedness and impartiality which can be expected from tribunals'.[42] The critical question is then not one of principle but of effectiveness. In order to assess the recent growth of administrative review, it is necessary to consider the practical operation of administrative review in areas such as social security and immigration. It is this to which we now turn.

Administrative review in operation

Social security mandatory reconsiderations

[39] Council on Tribunals, *Annual Report 1989/90* (1990), [1.14].
[40] Council on Tribunals, *Annual Report 1989/90* (1990), [1.9]. See also R. Sainsbury, 'Internal Reviews and the Weakening of Social Security Claimants' Rights of Appeal' in G. Richardson and H. Genn (eds), *Administrative Law & Government Action* (Oxford University Press, 1994).
[41] The Leggatt Report, *Tribunals for Users: One System, One Service* (2001), [9.6].
[42] Ibid., [9.6] and [9.8].

The Department for Work and Pensions (DWP) makes some 12 million benefit decisions per year. Initial claims for benefits are lodged and then decided by officials. For the two principal benefits, Employment and Support Allowance and Personal Independence Payments, a health care assessment will often be undertaken by a 'healthcare professional' employed by a contracted-out provider. Refused claims can be appealed to the First-tier Tribunal (Social Entitlement Chamber) comprised of a tribunal judge and non-legal members.[43] In addition to appeals, the DWP has long had the power to review its own decisions.[44] In this way, administrative review is a fundamental feature of the system given that decision-making is often based on factors – such as an individual's circumstances, including their health and income – that can change.

In 2013 the DWP introduced mandatory reconsideration with the aim of resolving disputes as early as possible and reducing unnecessary demand on tribunals. This major process change made administrative review a distinct and mandatory stage before claimants could proceed to a tribunal. The former position was that claimants seeking to challenge initial refusal decisions could appeal straightaway to the tribunal. On receipt of an appeal, the DWP would routinely review its decision. If the decision was reviewed in the claimant's favour, then the appeal would lapse; if not, the appeal would proceed to the tribunal. However, with mandatory reconsideration, the review stage is a separate and compulsory stage in the dispute process. Claimants can now only appeal if they first request the department to reconsider its initial decision and then, second, lodge an appeal with the tribunal.[45] In short, a one-step process has become a two-stage process. Such changes have taken place against a background of austerity and welfare reform to reduce benefit spending through stringent rules and policies, such as benefit sanctions.[46] A controversial feature has been the

[43] The First-tier Tribunal (Social Entitlement Chamber) has 1,700 judges and non-legal members.
[44] Social Security Act 1998, ss 9 and 10.
[45] Welfare Reform Act 2012, s 102; The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (SI 2013/381). A concurrent change was that whereas previously claimants lodged their appeals with the DWP, appeals are now lodged directly with the tribunal.
[46] For an overview, see N. Timmins, 'The Coalition and Society (IV): Welfare' in A. Seldon and M. Finn (eds), *The Coalition Effect, 2010-2015* (Cambridge: Cambridge University Press, 2015); C. Beatty and S. Fothergill, 'Welfare Reform in the United Kingdom 2010–16: Expectations, Outcomes, and Local Impacts' (2017) *Social Policy and*

outsourcing of health assessments to private companies, such as ATOS and Maximus. Such providers have been subject to criticism concerning the quality of assessments and the resulting high appeal success rates.

Between 2013 and 2017, some 300 officials (mostly at Executive Officer grade) have undertaken some 1.5 million mandatory reconsiderations. The principal advantage of the process is timeliness. Since 2014, the average monthly clearance time for mandatory reconsiderations has not exceeded 20 days.[47] This compares with an average timeliness of appeals of 20 weeks.[48] Given that benefits claimants have a significant interest in timely decisions on their entitlements, the shorter time taken by mandatory reconsideration is a considerable advantage. At the same time, there are various concerns with other aspects of the process.

A major concern is that the two-stage nature of the process—mandatory reconsideration then appeal–has arguably weakened access to justice by deterring claimants with strong cases from proceeding to tribunals. As Figure 1 demonstrates, there has been a dramatic decline in the number of appeals lodged following the introduction of mandatory reconsideration. In 2014/15, appeal receipts were 73 percent lower compared with 2013/14.[49] There have been other contributory factors in play here too, such as the early cancellation in 2014 of the contract with ATOS to undertake health assessments and a consequent slowdown in initial decisions.[50] According to the DWP, the reduction in the volume of appeals is evidence that mandatory reconsideration was successful in its aim of resolving more disputes without the need for appeal.[51]

Administration (online pre-publication). On sanctions, see M. Adler, 'A New Leviathan: Benefit Sanctions in the Twenty-first Century' (2016) 43 *Journal of Law and Society* 195.

[47] DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (2017), p.7.

[48] Ministry of Justice, *Tribunal Statistics Quarterly* (2017), main tables sheet T.3.

[49] The subsequent increase is largely accounted for by appeals lodged by claimants being transferred from Disability Living Allowance to Personal Independence Payments.

[50] J. Warren, K. Garthwaite and C. Bambra, 'After Atos Healthcare: is the Employment and Support Allowance Fit For Purpose and Does the Work Capability Assessment Have a Future?' (2014) 29 *Disability & Society* 1319.

[51] Department for Work and Pensions, *Government Response to the House of Commons Work and Pensions Select Committee's Report on Employment and Support Allowance and Work Capability Assessment* (Cmd 8967, 2014), p.22.

[Figure 1 here]

To some extent, a reduction in appeals was to be expected if the new system was working well. Mandatory reconsideration was justified in part as a filtering mechanism to reduce unnecessary appeals. Such filtering, common in other redress mechanisms such as judicial review and ombudsmen, is necessary to manage caseloads. Yet, with mandatory reconsideration, the filtering is being undertaken by the same government department whose initial decisions are being challenged, prompting concerns that government may have a self-interest in discouraging claimants from pursuing their cases further.[52] Furthermore, claimant fatigue often discourages people from challenging decisions and this is likely to be a major factor here. Vulnerable individuals—such as those with a long-term disability or mental illness—often lack the ability and confidence to pursue a challenge to a welfare bureaucracy, especially when their claim has already been rejected twice.[53] The change with mandatory reconsideration is that an individual must twice decide to challenge in order to appeal. According to Judge Robert Martin, the former Tribunal Chamber President, mandatory reconsideration 'is of dubious advantage':

> It builds in an extra step, in that the claimant now has to make two applications: mandatory reconsideration and then appeal. It is bound to take longer. Personally, I am quite concerned that a number of claimants who may have winnable cases drop out between the mandatory reconsideration stage and deciding to make a further appeal. It seems to me to be regressive. The only value would be if mandatory reconsideration … resulted in a much more rigorous reappraisal by the Department of its decisions than under the old scheme.[54]

[52] A previous empirical study found that local authority officers could use administrative review to control claimants' access to tribunals: T. Eardley and R. Sainsbury, 'Managing Appeals: The Control of Housing Benefit Internal Reviews by Local Authority Officers' (1993) 22 *Journal of Social Policy* 461.
[53] S. Halliday and D. Cowan, *The Appeal of Internal Review: Law, administrative justice, and the (non-) emergence of disputes* (Oxford: Hart, 2003), pp.138-140.
[54] Oral evidence of HH Judge Robert Martin to the House of Commons Work and Pensions Committee inquiry, *Employment and Support Allowance and Work Capacity Benefits* HC 1212 7 May 2014, Q96.

There is also the related impact of taking social security out of scope for legal aid and reductions in advice services.[55] The Upper Tribunal has expressed scepticism as to whether mandatory reconsideration has any real advantages in reducing unnecessary appeals that have merit; under the previous system, the department would treat an appeal as a request for a revision and review the decision before it reached the tribunal.[56] Determined claimants can still appeal. Nonetheless, the need to make two applications to access the tribunal rather than the previous single application may well discourage vulnerable claimants with winnable cases from appealing because they find the process too onerous. As the Supreme Court recognised in *Unison*, impediments to access to justice can constitute a serious hindrance even if they do not make access completely impossible.[57]

Such access to justice concerns have arisen in part because of the effect of mandatory reconsideration upon the behaviour of a vulnerable group of claimants. They have also arisen by the DWP adopting the position that applications for mandatory reconsideration made out time did not generate a right of appeal to the tribunal. Instead, the Department contended, the appropriate remedy was to seek judicial review of the DWP's decision not to allow a mandatory reconsideration out of time. However, in *R (CJ) and SG v Secretary of State for Work and Pensions* the Upper Tribunal ruled against the DWP holding that there was a high risk that vulnerable claimants with good claims could miss the time limits, a risk exacerbated by the reduction in advice services. According to the Upper Tribunal, the consequence of the Department's approach was that it had improperly assumed the role of gatekeeper to the tribunal system. To deny the right of appeal to claimants who made out of time applications for reconsideration would remove the right of appeal and result in a significant number of claimants entitled to benefits not receiving them.[58]

[55] Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[56] *R (CJ) and SG v Secretary of State for Work and Pensions* (ESA) [2017] UKUT 0324 (AAC), [26].
[57] *R (Unison) v Lord Chancellor* [2017] 3 WLR 409, [78] (Lord Reed).
[58] *R (CJ) and SG v Secretary of State for Work and Pensions* (ESA) [2017] UKUT 0324 (AAC).

What then of the quality of reconsideration decision-making? Shortcomings had been identified in the pre-2013 reconsideration system by the then President of Appeal Tribunals. There was little consistent evidence that the DWP had been effectively reconsidering decisions before they came to the tribunal; 'often the appeal papers show an unwillingness on the part of the decision-maker to reconsider the decision in the absence of the appellant supplying fresh medical or other third party evidence'.[59] With mandatory reconsideration, the Department stated that it would ensure its decisions would go through a 'robust reconsideration' by which decisions would be checked thoroughly and be accompanied by detailed reasons.[60] Nevertheless, the quality of reconsideration decisions has been criticised.[61] Tribunal Judges have expressed scepticism about the thoroughness of mandatory reconsideration and view the process as an additional administrative barrier for claimants who wish to challenge their decision rather than a substantive re-examination of the evidence.[62] Advisers have stated that decision notices often repeat initial refusal reasons without providing any further elaboration. There is also a widely held perception that the 'chances of a claimant actually having their decision revised at mandatory reconsideration stage are almost negligible to the point where most advisers and claimants view mandatory reconsideration as a formality and expect a negative decision.'[63]

As regards claimants, of all the transactions claimants have with DWP, mandatory reconsideration has the lowest satisfaction rating.[64] Claimants have felt that new evidence submitted for a reconsideration is often ignored and that the process is more of a 'rubber stamp' than a thorough audit of the original decision.[65] This in turn prompts some claimants to lodge appeals against poor

[59] President of the Social Entitlement Chamber of the First-tier Tribuna*l, Report on the Standards of Decision-making by the Secretary of State and Child Maintenance and Enforcement Commissioner 2007-08* (2008), [1.7].
[60] Department for Work and Pensions, *Mandatory Consideration of Revision Before Appeal* (2012), p.11.
[61] See, e.g., *MD v HMRC* (TC) [2017] UKUT 0106 (AAC) at [11] in which the Upper Tribunal found the reconsideration to be 'woefully inadequate … [without] any meaningful reasoning'.
[62] P. Gray, *The Second Independent Review of the Personal Independence Payment Assessment* (DWP, 2017) 45.
[63] National Association of Welfare Rights Advisors, *Response to Social Security Advisory Committee Consultation Review into Decision Making and Mandatory Reconsideration* (2016) 11.
[64] Department for Work and Pensions, *DWP Claimant Service and Experience Survey 2014/15* (2016) 85.
[65] Gray, above no 64, p.45.

decisions that could have been properly resolved earlier. For instance, it is common for claimants to be awarded no entitlement points initially, to submit additional information at the reconsideration, which then confirms the initial decision, for the tribunal to then award maximum points.[66] There are also concerns that reviewers routinely accept health care reports from the DWP's contracted-out supplier, the quality of which has been criticised,[67] and disregard other evidence such as a medical report by a General Practitioner, the quality of such reports has been subject to sustained criticism. Tribunal judges have noted that they regularly see decision letters and health assessment reports at appeal hearings that have used standard or repetitive language for different functions, which in turn undermines confidence in the rigour of the original assessment.[68]

Such features are, in turn, reflected in the noticeably lower success rates for claimants at mandatory reconsideration compared with appeals (Figures 2 and 3). Of the 1.4 million reconsiderations decided between 2013-18, 20 per cent were allowed. By contrast, appeal success rates have been substantially higher: 40per cent rising to 65 per cent. What is striking here is that while mandatory reconsideration was introduced to reduce unnecessary appeals, the proportion of initial decisions overturned by tribunals has increased.

[Insert Figures 2 and 3]

Comparing review and tribunal outcomes is not necessarily comparing like with like because of the different cohorts of claimants. Furthermore, the wider issue as to why tribunals allow appeals is contested. The DWP has argued that appeals are often allowed because claimants submit new

[66] Ibid., 29. Tribunal judges have noted that they often see appellants awarded no entitlement points initially, who are then given the maximum award possible: 'Why I went to court for my disability payments' BBC News 2 May 2017. Claims for both Employment and Support Allowance and Personal Independence Payments are decided on the basis of a graded scale of points scored against health conditions and living abilities.
[67] House of Commons Public Accounts Committee, *Department for Work and Pensions: Contract Management of Medical Services* HC 744 (2012-13); House of Commons Public Accounts Committee, *Contracted Out Health and Disability Assessments* HC 727 (2015-16).
[68] Gray, above no 64, p.45.

evidence not previously considered.[69] Accordingly, the rate of allowed appeals is not a perfect measure of the quality of initial decisions. Nonetheless, it is one such measure. Furthermore, the high and unprecedented rate of allowed appeals – 65 per cent – confirms that the mandatory reconsideration process is not being used to filter out appeals likely to be allowed by tribunals. On the contrary, the success rate indicates that significant improvements are required to the reconsideration process so that it can capture similar information as tribunals. At present, the mandatory reconsideration process results in a significant number of claimants not receiving benefits to which they are entitled if they do not pursue their cases to the tribunal. Further, the high proportion of allowed appeals erodes the trust of claimants and stakeholders in the system. As the Senior President of Tribunals has noted, the DWP frequently provides no justiciable defence against challenges to its decisions resulting in unnecessary appeals; the mandatory reconsideration process does nothing to improve the situation.[70]

A further area of concern relates to the wider public goods of litigation which may be obscured by the expansion of administrative review.[71] One of the principal social purposes of administrative law litigation should be to identify ways of improving the quality of government decision-making more widely.[72] Ideally, a redress system should have feedback-loops built in throughout to improve front-line decisions.[73] However, there is a mismatch between the Department's ambitions and administrative reality. While the DWP aspires to a 'right first time' approach, it has struggled to raise the quality of decision-making. Staff undertaking mandatory reconsiderations are not routinely notified if their decisions are overturned by tribunals.[74] Previous research has found that the most

[69] For debate, see: House of Commons, *Fourth Delegated Legislation Committee* (2013-14); Hansard HC Debs vol 624 cols 308-335 29 March 2017, with reference to Personal Independence Payments and Gray, above no 64, pp.46-47.
[70] E. Dugan, 'A Senior Judge Has Suggested Charging the Government for Every "No-Brainer" Benefits Cases It Loses in Court' BuzzFeed News 9 November 2017, available at: https://www.buzzfeed.com/emilydugan/most-dwp-benefits-cases-which-reach-court-are-based-on-bad?utm_term=.faAjD3GQz#.kcX6rE30n (last accessed 23/11/17).
[71] *R (Unison) v Lord Chancellor* [2017] 3 WLR 409, [69]-[72] (Lord Reed).
[72] R. Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] PL 111.
[73] Administrative Justice and Tribunals Council, no 5 above.
[74] Social Security Advisory Committee, *Decision Making and Mandatory Reconsideration* (2016), p.50.

effective influence of tribunals was through direct practical experience by individual officials in seeing how tribunals adjudicated upon cases.[75] The department is increasing the previously low attendance by presenting officers, but the role of tribunals has overall been diminished.

Elsewhere in the benefits system, the problems have been more acute. The contracting-out of tax credit compliance checks to a private company, Concentrix, was marked by widespread failures in decision-making, such as official error and incorrect allegations of fraud. Vulnerable people lost benefits to which they were entitled, causing hardship. In this context, there was a 90 per cent success rate through mandatory reconsideration. This was accepted by both HM Revenue and Customs and Concentrix as a routine feature of the system, but there was no focus on improving initial decisions for those people who did not seek a mandatory reconsideration.[76]

Overall, the underlying idea of having a quick and informal reconsideration of social security decisions is unobjectionable, but has been highly problematic in practice. The Social Security Advisory Committee raised concerns that mandatory reconsideration is not working as it should and made detailed recommendations.[77] In response, the DWP has sought to improve the gathering of evidence and the quality of decision-making.[78] In 2018, the Work and Pensions Committee, noting the renewed focus on quality, recognised that mandatory reconsideration decision making had not always been characterised by thoroughness, consistency and an emphasis on quality and that not all claimants, perhaps wrongly, been turned down at this stage, will have had the strength and resources to appeal.[79]

Immigration administrative reviews

The Home Office decides some 3.5 million immigration applications per year to determine the immigration status of individuals against the requirements of the Immigration Rules and

[75] N. Wikeley and R. Young, 'The Administration of Benefits in Britain: Adjudication Officers and the Influence of Social Security Appeal Tribunals' [1992] PL 238, 250-259.
[76] House of Commons Work and Pensions Committee, *Concentrix* (HC 720 2016-17).
[77] Social Security Advisory Committee, above no 76.
[78] Department for Work and Pensions, *DWP Response to SSAC Report on Mandatory Reconsideration Processes* (2017).
[79] House of Commons Work and Pensions Committee, *PIP and ESA assessments* (2017-19 HC 829), [66].

supplementary policies. Immigration appeals were introduced in 1971 on the basis that it was 'fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal.'[80] Given the exceptionally sensitive nature of this jurisdiction and the risks of illegitimate executive pressure, great importance has been attached to the safeguards provided by tribunals: a full re-hearing of the evidence by an independent and judicial decision-maker; adversarial hearings; detailed reasoned decisions; and onward rights of appeal. However, as pressures on the system has grown with the increase in immigration, so have the volume of appeals and associated costs.[81] The Home Office has long seen the appeals process as an impediment to its task of enforcing immigration controls. The deeply-embedded culture within the Home Office is that vexatious appeals are often lodged by people to postpone their removal from the UK and the more delay they can induce, then the better their chances of being ultimately able to stay. Yet, the appeals process has been successful in terms of providing individuals with an effective remedy. Some 40 per cent of immigration appeals were routinely allowed. Furthermore, the courts have increasingly intervened to enhance the role of appeals.[82]

Acutely aware of the obstacle to limiting overall immigration presented by tribunals, the Home Office has then endeavoured to curtail appeals as part of its drive to create a 'hostile environment' for immigrants. In 2013, the then Home Secretary described the appeals process as 'a never-ending game of snakes and ladders' open to exploitation by foreign criminals, immigrants, and

[80] Home Office, *Report of the Committee on Immigration Appeals* Cmnd 3387 (1967); Immigration Act 1971.
[81] R. Thomas, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions' in Palmer et al, no 23 above.
[82] See, e.g., *Lord Chancellor v Detention Action* [2015] 1 WLR 5341 (fast-track detained process for asylum appeals was systemically unfair and unjust); *R (Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)* [2016] UKUT 00561 (IAC) (the Home Office had abused its power by not using a decision-making mechanism that attracted a right of appeal); *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380 (out of country appeal process was unfair); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755 (overturning the UTIAC, the Court of Appeal held that, under the European Economic Area, extended family members regulations have a right of appeal).

their lawyers to delay the enforcement of immigration law.[83] In 2014, all existing and long-standing immigration appeal rights (except on asylum and human rights grounds) were replaced with administrative review.[84] This was estimated to save £261 million over 10 years.[85]

Given the toxic politics of immigration, replacing appeals with administrative review was widely viewed by immigration lawyers as another way of undermining fairness for applicants, reinforcing a deep-seated mutual distrust between them and the Home Office. Intense concerns were also raised in Parliament. It was argued that administrative review was not being introduced to secure fairness and justice for refused immigrants, but to reduce the number who would have succeeded had they been able to put their case to a tribunal.[86] The Joint Committee on Human Rights invoked the well-known dictum of Hale LJ: '[i]n this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.'[87] Accordingly, withdrawing appeals would undermine the common law right of access to justice.[88] The Home Office was implacable: only fundamental rights cases justified the expense and delay of an appeal. Immigration decisions did not fall within the right to a fair trial (Article 6 ECHR).[89] The Home Office did not recognise the notion of an overarching common law right of access to justice over and above primary legislation. The result is that only around 12 per cent of the 3.5 million immigration decisions per year now attract a right of appeal. Nonetheless, the Home Office had admitted that the high appeal success rate was largely attributable to its own errors: approximately 60 per cent of appeals were allowed due to casework errors.[90] As one MP noted, 'the Government's response to this high margin of error is not to seek to improve the quality of their

[83] Theresa May, Home Secretary, speech at the Conservative Party conference, Manchester, September 2013, http://www.ukpol.co.uk/theresa-may-2013-speech-to-conservative-party-conference/; Immigration Act 2014, s 15. Family visitor appeals had already been abolished: Crime and Courts Act 2013, s 52.
[84] Immigration Act 2014, s 15; Immigration Rules, Appendix AR.
[85] Home Office, *Impact Assessment of Reforming Immigration Appeal Rights* (2013) 2.
[86] Hansard HL Debs Vol 752 col 1353 5 March 2014 (Lord Avebury).
[87] *R v Secretary of State for the Home Department, ex parte Saleem* [2001] 1 WLR 443, 458 (Hale LJ).
[88] Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* HL 102 HC 935 (2013-14), [39]. See also House of Lords Constitution Committee, *Immigration Bill* HL 148 (2013-14), [3]-[5].
[89] Home Office, *Government Response to the Joint Committee on Human Rights, Eighth Report of Session 2013–14* (2014) 2; Home Office, *Immigration Bill: ECHR Memorandum* (London: Home Office, 2013) 14-16.
[90] Home Office, *Impact Assessment of Reforming Immigration Appeal Rights* (London: Home Office, 2013), p.7.

decision making, but rather to reduce the opportunities for challenge'.[91] This made little difference to the political juggernaut. Indeed, the Home Office had the chutzpah to argue that the delays and costs of appeals were 'not fair to applicants'.[92]

Previous administrative review processes in the immigration context have been widely criticised. Reviews had been characterised by boilerplate reasons, inconsistencies, and carelessness and were ineffective in identifying errors.[93] In 2004, only one per cent of reviews succeeded for claimants compared with 40 per cent of appeals.[94] According to the then Independent Monitor, the Home Office needed to improve the quality of reviews.[95] Unsurprisingly, the Home Office subsequently gave its administrative review system a clean bill of health.[96] Despite such concerns, reviews operated largely against the safety-net of appeals. By contrast, the 2014 changes marked a clean break with appeals and the withdrawal of this safeguard. Remaining appeals on human rights grounds will, in future, increasingly take place out of country.[97]

To meet concerns over the abolition of appeals, ministers gave assurances.[98] Administrative reviews would be undertaken by fully trained and experienced staff who would be independent of the original decision-maker and located in a separate operational unit. Feedback mechanisms would be established. The Home Office would also monitor the overturn rate on administrative review and investigate any discrepancy with the appeal success rate.[99] In practice, none of these assurances were

[91] HC Deb vol 569, col 199 22 October 2013 (Barry Gardiner MP). See also HC Deb vol 569 col 189 22 October 2013 (Fiona MacTaggart MP).
[92] Home Office, *Immigration Bill Factsheet: Appeals (clauses 11-13)* (London: Home Office, 2013), p.1.
[93] House of Commons Constitutional Affairs Committee, *Asylum and Immigration Appeals* HC 211 (2003-04), [107]; Independent Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications* (2016), [6.61].
[94] National Audit Office, *Visa Entry to the UK: The Entry Clearance Operation* HC 367 (2003-04), [2.24].
[95] Independent Monitor for Entry Clearance Refusals, *Report for 2005* (London: Home Office, 2006).
[96] Home Office, *Report on Removal of Full Appeal Rights Against Refusal of Entry Clearance Decisions Under the Points-Based System* (London: Home Office, 2011). By 2008, the points-based scheme for work and study routes had replaced discretion with objective decision criteria and with this various appeal rights had been replaced with administrative review: Immigration, Nationality and Asylum Act 2006, s 4.
[97] Immigration Act 2016, s 63. See P. Jorro, 'The Enhanced Non-suspensive Appeals Regime in Immigration Cases' (2016) 30 *Journal of Immigration, Asylum and Nationality Law* 111.
[98] Hansard HL Debs Vol 752 cols 1357-1358 5 March 2014 (Lord Wallace of Tankerness, Advocate General for Scotland).
[99] Home Office, *Statement of Intent: Administrative Review* (London: Home Office, 2013) 4.

kept. The Chief Inspector of Borders and Immigration found that administrative reviews were being undertaken by low-level, untrained, and temporary staff with limited or no experience of immigration law, a notoriously complex area.[100] Quality assurance was minimal and ineffectual. Valid applications had been incorrectly rejected and this had not been picked up. To ensure a degree of independence, in-country reviewers had been organised into a functionally separate unit from initial decision-makers, but the unit had been staffed with junior and inexperienced officials. Complex cases were not referred upwards to more senior caseworkers. By contrast, overseas reviewers worked alongside primary decision-makers; although there was no evidence of bias, it was more difficult to demonstrate that reviewers were truly independent.

As regards the quality of review decisions, administrative reasons must be proper, adequate, intelligible, and deal with the substantial points raised.[101] In practice, review decisions have been characterised by 'an over-reliance on the initial refusal decision letter' without addressing the applicant's points of challenge.[102] Perfunctory review notices that merely reiterate initial refusal reasons do not comprise an effective review.[103] Another constraining factor is that fresh evidence will normally be disregarded irrespective of its importance.[104] Success rates have been lower - far lower - than those of appeals. Some 49 per cent of appeals allowed under the former regime. The Home Office had concluded that 60 per cent of allowed appeals succeeded due to case-working errors. By contrast, in 2015-16, the success rate was eight per cent for in-country reviews and 22 per cent for at the border reviews.[105] In 2016/17, the success rate was 3.4 per cent for in-country reviews and 6.8 per cent for border reviews.[106] Assurances that such discrepancies would be investigated were unfulfilled - as were

[100] Independent Chief Inspector of Borders and Immigration, *An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014* (London: ICIBI, 2016).
[101] *In Re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478; *MK v Secretary of State for the Home Department (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC).
[102] Independent Chief Inspector of Borders and Immigration, no 99 above, 5.
[103] *R (Akturk) v Secretary of State for the Home Department* [2017] EWHC Admin 297 at [47].
[104] Immigration Rules, Appendix AR 2.4
[105] Independent Chief Inspector of Borders and Immigration, no 99 above, 8.
[106] Independent Chief Inspector of Borders and Immigration, *A Re-inspection of the Administrative Review Process* (London: ICIBI, 2017), para 2.6.

promises of feedback loops to improve initial decision-making. The only assurance met was that reviews would be processed within 28 days.

On top of this, the replacement of appeals with reviews reveals a wider flawed design. Without appeals, recourse to judicial review becomes more likely. However, for challenging individualised decisions, judicial review does not provide as effective a remedy as an appeal.[107] Tribunals undertake a full examination of the factual and legal basis of an individual's case. Their decisions are final, subject to any onward challenge. The inability of the judicial review court to engage in fact-finding or to substitute decisions renders it an 'entirely unsatisfactory' mechanism for determining individual fact-sensitive issues.[108] Judicial review only enables the court to quash a decision on relatively narrow grounds. It is also more costly, takes longer than appeals, and the Upper Tribunal currently has a high caseload.[109]

The suspicions of immigration lawyers–that the Home Office cannot be trusted to mark its own homework–have effectively been confirmed by poor implementation. The Chief Inspector of Borders and Immigration has concluded that there was 'there was significant room for improvement in respect of the effectiveness of administrative review in identifying and correcting case working errors, and in communicating decisions to applicants'.[110] Even the normally defensive Home Office accepted that 'quality has not consistently been of the standard to which we aspire' and largely accepted the recommendations made.[111] A subsequent investigation found some improvements by the Home Office.[112] Yet, it also found that the Home Office had been unable to demonstrate that it had delivered an efficient, effective, and cost-saving replacement for the previous appeals

[107] *R v Secretary of State for the Home Department, ex parte Saleem* [2001] 1 WLR 443, 451 (Roch LJ); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755 at [46] (Irwin LJ).
[108] *R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) IJR* [2015] UKUT 00327 (IAC) at [36]-[40]; *SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 (IAC) at [102].
[109] R. Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] PL 652; R. Thomas, 'Immigration Judicial Reviews: Resources, Caseload, and "System-manageability Efficiency"' (2016) 21 *Judicial Review* 209.
[110] Independent Chief Inspector of Borders and Immigration, no 99 above, 2.
[111] Home Office, *Response to the Independent Chief Inspector's Report: An Inspection of the Administrative Review Processes Introduced Following the 2014 Immigration Act* (London: Home Office, 2016) 1.
[112] Independent Chief Inspector of Borders and Immigration, no 105 above.

mechanisms.[113] There continue to be serious weaknesses remaining in respect of reason-giving, the lack of a dedicated team for overseas reviews, and the variable level of quality assurance for overseas and border reviews. In its response to the report, the Home Office, noting that in-country reviews have improved, accepted that progress has been slower for reviews undertaken overseas and at the border.

Does administrative review enhance or weaken administrative justice?

The basic test of administrative justice is whether the qualities of a decision-making process provide arguments for the acceptability of its decisions.[114] Acceptability implies trust and confidence.[115] The above examination of different administrative review schemes presents a highly mixed picture. There are pockets of good practice. It is also apparent that some individual claimants may well feel that their particular cases were handled satisfactorily regardless of weaknesses in the wider administrative review system. Nonetheless, there are serious concerns concerning the operation of some administrative review schemes, in particular mandatory reconsideration and immigration reviews. In principle, administrative review could provide a swift and effective review of a decision, but in practice, the quality of review procedures and decision outcomes is highly variable. Success rates are substantially lower than those of tribunals. Mandatory reconsideration seems to deter many benefit claimants from pursuing their case to a tribunal. Immigration appeals have been largely abolished. There is little evidence that administrative review has raised the quality of initial decisions. Many of the legitimising qualities of tribunals–judicial procedures; independent, judicial and specialist decision-makers; and better reasoned decisions–have effectively been jettisoned for little in return. In light of such features, it is unlikely that many claimants would have confidence in administrative review as an adequate remedy. It might be objected that this analysis is misplaced: administrative

[113] Ibid., 2
[114] Mashaw, no 1 above, 24-25.
[115] R. Kagan, 'The Organisation of Administrative Justice Systems: The Role of Political Mistrust' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010).

review will inevitably be seen as inferior when compared with tribunals. But, given the relative importance of decisions, everyone ought to be able to expect a good decision to determine their entitlements. It is important not to allow the search for the best to defeat the good but, to be effective, redress procedures must achieve minimum standards.

Even from a more sanguine view of the new administrative review, the practical effect of administrative review has still been to weaken the ability of people to secure effective redress. Process does not wholly determine outcome. Nevertheless, procedural restrictions are likely to have substantive effects thereby worsening the position for claimants.[116] The risk is that fewer claimants now qualify because of the shift from tribunals to administrative review. Administrative review has also weakened public accountability of government. The transparency and openness of independent tribunal scrutiny has been significantly reduced. Indeed, it has been argued that the real attraction of administrative review is that it enables government to conceal from public view the full inadequacies of initial decision-making.[117] Another wider consequence is that the proliferation of different administrative review schemes represents another likely source of confusion to the public in its understanding of the administrative justice system: the subtle though crucial dichotomy between appeals and complaints is not widely appreciated by the public and liable to confuse.[118] Administrative review adds a further set of distinctions likely to exacerbate the problem. On the basis of the way the systems have been implemented, the recent expansion of administrative review is, in essence, a problematic response to the judicialisation of tribunals.

Enhancing the quality of administrative review is then required. Indeed, the Law Commission is to undertake a law reform project on administrative review.[119] We suggest that the following

[116] M. Adler, 'Understanding and Analysing Administrative Justice' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010) 132-136; *R (Parmak) v Secretary of State for the Home Department* [2006] EWHC 244 (Admin) at [27] (Sullivan J).

[117] T.G. Ison, '"Administrative Justice": Is It Such a Good Idea?' in M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century* (Oxford: Hart, 1999) 39.

[118] P. Dunleavy, S. Bastow, J. Tinkler, S. Goldchuck and E. Towers, 'Joining Up Citizen Redress in UK Central Government' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010) 422-428.

[119] Law Commission, *Thirteenth Programme of Law Reform* (2017-18 HC 640), pp.13-14.

reforms are worthy of consideration. First, to ensure their independence and to insulate them from political and administrative pressures, administrative review systems need to be separate and autonomous from initial decision-making institutions. Second, reviews should be undertaken by specialist and expert reviewers with experience of initial decision-making. Such reviewers need specialist training in the essential aspects of decision-making: fact-gathering and assessment; using inquisitorial procedures effectively; and reason-giving. At present, government departments have complete control of both initial and review decisions and procedures. In this respect, the refusal of both the DWP and the Home Office to allow continuous independent and external oversight of the operation of their review procedures is an unfortunate missed opportunity to promote public confidence.[120] Third, government bodies need to take more responsibility for promoting the quality of both procedures and decision outcomes. At present, some claimants experience unnecessary difficulty in attaining their entitlements. This is self-defeating as it undermines the legitimacy of government. Government must ensure that the quality of procedures and decisions has equal priority as speed and cost. To this end, government needs to invest in developing adjudication as a decision-making technique and embed a culture of adjudication within the administrative review process in order to raise and maintain the quality of decision-making. Another option would be to make government departments themselves to pay the costs of allowed appeals. More generally, there needs to be commitment to the principle of systematic improvement to enhance the quality of both review processes and decisions. The flaw of current review processes is that it is possible to replicate the same quality as tribunals on the cheap. The fate of such proposals of course rests with government itself taking the initiative.[121]

[120] Social Security Advisory Committee, above no 73, 50; Department for Work and Pensions, *Government Response: SSAC report on decision making and mandatory reconsideration* (2017). The Home Office did consider establishing an external quality assurance panel to review a random anonymised sample of decisions, only to then reject it: Home Office, above no 108, [11.6].

[121] E.A. Posner and A. Vermeule, 'Inside or Outside the System?' (2013) 80 *University of Chicago Law Review* 1743.

Administrative review, judicial power and the separation of powers

In this final part of the article, we consider the implications of the expansion of administrative review and the corresponding displacement of tribunals for the wider understanding of the public law system. In particular, we consider what insights this experience offers in respect of the debate on judicial power and the separation of powers within the UK constitution.

In recent years, public law scholars in the UK have observed how the power of judges to review government decisions has increased.[122] There are many examples commonly offered in support of observations, such as the development of common law rights jurisprudence and the enactment of the Human Rights Act 1998. The fear of some is that the courts are progressively trespassing beyond their appropriate constitutional and institutional boundaries, and becoming too involve in what are essentially 'policy' decisions that ought to be taken by other decision-makers.[123] This broad concern has been given even greater prominence voice by the Judicial Power Project.[124] The founders of the Project, and those who have expressed similar concerns, have regularly based their arguments up a reconstruction of JAG Griffith's political constitution thesis, claiming that the UK's traditional constitutional arrangement, which placed emphasis on political controls on power, are being supplanted by an emphasis on legal constitutionalism.[125] The concern is that judicial power is usurping political and democratic power—breaching the separation of powers[126] and creating a "juristocracy."[127] While there have been volumes written on the topic of judicial power in the past few years alone, the significant dismantling of judicial control of government effected through the

[122] This has been an international trend, see *e.g.* M. Shapiro and A. Stone-Sweet, *On Law, Politics and Judicialization* (OUP, Oxford 2002); A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford 2000).

[123] See *e.g.* J. Sumption QC, 'Judicial and Political Decision-Making: The Uncertain Boundary' (FA Mann Lecture, 2011); Lord Sumption, 'The Limits of Law' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart, Oxford 2016),

[124] Judicial Power Project, "About" available at: <http://judicialpowerproject.org.uk/about> [accessed 6 July 2018]. Far from all are convinced by the mission of the Project, see P. Craig, 'Judicial Power, the Judicial Power Project and the UK' (2018) 36(2) *University of Queensland Law Journal* 355.

[125] J.A.G. Griffith, 'The Political Constitution' (1979) 43 M.L.R. 1; G. Gee, 'The political constitutionalism of JAG Griffith' (2008) 28 *Legal Studies* 20.

[126] See *e.g.* R. Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, London 2018).

[127] R. Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Massachusetts 2007).

expansion of administrative review and the displacement of tribunals has been entirely absent from this debate.

The growth of administrative review is a clear demonstration of how judicial power has changed in *multiple* directions in recent years. While there has no doubt been an expansion of legal principle is some areas of public law, developments with administrative review shows how effective judicial control has also been removed and marginalised in other areas. This prompts questions about how *power* is understood in the debate around judicial power. The mainstream debate often takes power to mean the contours of legal doctrine as explained by judges, usually those judges sitting in appellate courts. This is an important metric. Yet, judicial power can also, and should also, be understood on the basis of what power is actually exercised over government. On this approach, the growth of administrative review is one of the most significant developments in judicial power in recent years. Far from being part of a rising "juristocracy," the powers of some parts of the tribunal judiciary—those that have been effectively or legally displaced by administrative review—occupy a relatively precarious position within the UK's constitutional framework. That is to say, they are a form of judicial control on administrative power that is insecure and subject to being significantly affected by the political and economic pressures that influence government policy.

The rise of administrative review also provokes reflection on the nature of the separation of powers more generally. Increasingly, the principle is held out as significant within the UK constitution.[128] In contrast to the idea of "checks and balances" under the separation of powers, recent changes to administrative review stand as a clear example of the ability of government to reshape fundamentally—in both design and effect—its own procedures and external dispute mechanisms, with little input or oversight from Parliament. Indeed, it underlines the huge amount of power inherent in positions occupied by government as designer, operator, and participant of the administrative justice system. From this perspective, the growth of administrative review in social

[128] See *e.g* R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP, Cambridge 2010); N. Barber, 'The Separation of Powers in the British Constitution' (2012) *Law: The Journal of the Higher School of Economics* 3.

security and immigration represents a form of capture of the justice system by which government departments have extended their own dispute resolution systems at the expense of public justice systems.

The performance of administrative review systems continues to receive insufficient attention from Parliament. The main external check on the performance of the administrative review systems have been reports by the Social Security Advisory Committee and the Independent Chief Inspector of Borders and Immigration, which recommended detailed reforms. Some, though far from all, of proposed reforms have been accepted. Such a state of affairs provides further support to Rubin's thesis that, in the context of the modern administrative state, the account of government we derive from the classic separation of powers metaphor of "three branches" checking and balancing seems out of place and out of time.[129] Instead, it reminds us that it is vital to move beyond conceptualisations of state based on a tripartite separation of powers mode and think more closely about the complex "networks" of accountability that give shape to the state and the justice system.

Finally, despite much discussion concerning the growth of judicial power, the courts appear reluctant to intervene meaningfully in the operation of administrative review systems. The courts have recognised that administrative review is a markedly less favourable remedy than tribunal appeals.[130] The courts have also undertaken wide-ranging interventions in the operation of *judicial* procedures on the ground of systemic inherent unfairness.[131] However, they appear reluctant to inquire into how an *administrative* process handles a mass caseload.[132] Article 6 ECHR right to a fair trial offers no scope for intervention in the immigration context, but has some potential bite in the social security

[129] E. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press, New Jersey 2007), chapter 2.
[130] *R (Akturk) v Secretary of State for the Home Department* [2017] EWHC Admin 297 at [71].
[131] See, e.g., *Osborn v Parole Board* [2013] UKSC 61; *Detention Action v Secretary of State for the Home Department* [2015] EWCA Civ 840; *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; F. Powell, 'Structural Procedural Review: An Emerging Trend in Public Law' (2017) 22 J.R. 83.
[132] *R (Edwards)* v. *Birmingham City Council* [2016] EWHC 173 (Admin) at [129]; *Hossain & Others v Secretary of State for the Home Department* [2016] EWHC 1331 (Admin) at [144]-[146].

context.[133] The long-established curative principle, that access to judicial review—as opposed to an appeal—is sufficient to remedy administrative unfairness, has increasingly been doubted. The Upper Tribunal and the higher courts have emphasised the advantages of appeals over judicial review when expanding immigration appeals and, in the social security context, to prevent the mandatory reconsideration time limit from reducing access to tribunals.[134] There are also indications that a putative common law jurisprudence on access to justice could provide a basis for judicial intervention, though this is only ever likely to shave off some particularly sharp edges.[135]

Overall, the recent experience with administrative review exposes a very different side to recent debates about judicial power and the separation of powers within the UK constitution. Instead of the expanded powers wielded by a juristocracy, this is evidence of significant curtailing of judicial control of government. Instead of effective Parliamentary oversight and control of administrative power, we see administration redesigning and controlling its own redress system while being subject to minimal scrutiny from the legislature. Finally, we see that the courts have only limited power to influence the operation of administrative review system which, on examination, can have adverse consequences for administrative justice.

Conclusions

This article has considered the recent rapid growth of administrative review through detailed studies of social security and immigration review processes. This experience reflects a wider and inherent predicament of contemporary justice systems. All justice processes face a fundamental trade-off

[133] Immigration decisions fall outside the scope of Article 6 ECHR: *Maaouia v France* (2001) 33 EHRR 42. Rights to social security benefits are 'civil rights' for the purposes of Article 6 ECHR: *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405. In *MM v Secretary of State for Work and Pensions* [2016] UKUT 36 (AAC), the Upper Tribunal held that the six months taken by the DWP to reconsider its decision breached the 'equality of arms' principle under Article 6 ECHR by placing the appellant at a substantial disadvantage.

[134] *R (Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)* [2016] UKUT 00561 (IAC); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755; *R (CJ) and SG v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC).

[135] *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409.

between the need for fairness and efficiency.[136] People want an authentic and credible means for resolving their disputes which are of high-quality, effective, timely, and use fair procedures. In practice, formal legal procedures tend to be costly. Increases in cases produce backlogs and delays, and ultimately often frustrate the immediate political ends governments is striving for. In response, the government has been seeking to formulate policy responses to cost and delay. One response has been to attempt reduce demand on formal legal procedures. Other responses include streamlining formal legal procedures or diverting disputes into ancillary alternative processes. The basic problem is that such alternative processes typically, though not necessarily, lack the authenticity and effectiveness of formal legal procedures and tend to weaken public confidence.

In principle, administrative review could be an advantageous way of seeking to resolve disputes quickly, at lower cost, and with less anxiety for individuals than appearing before tribunals. However, drawing upon a range of empirical evidence, we have demonstrated that the operation of administrative review in practice—at least in the contexts we have discussed—is characterised by multiple problems. It has found that the expansion of administrative review tends to reduce both access to justice and the quality of decision-making. Overall, there is a lack of independence and impartiality in how reviews are undertaken. There is variation in the way evidence is handled and in how review decisions are made. Administrative review success rates of administrative review are far lower than those of tribunals. There is a considerable difference between a review as a quick check as to whether the initial decision was wrong compared with a full de novo judicial fact-finding assessment. The insertion of administrative review has either withdrawn access to tribunals or made such access more difficult—displacing tribunals and curtailing judicial control of government. These shortcomings severely limit the effectiveness of administrative review. The overall outcome is a negative one for individuals in terms seeking access to justice to obtain their legal entitlements. At

[136] D. Cowan, A. Dymond, S. Halliday and C. Hunter, 'Reconsidering mandatory reconsideration' [2017] P.L. 215.

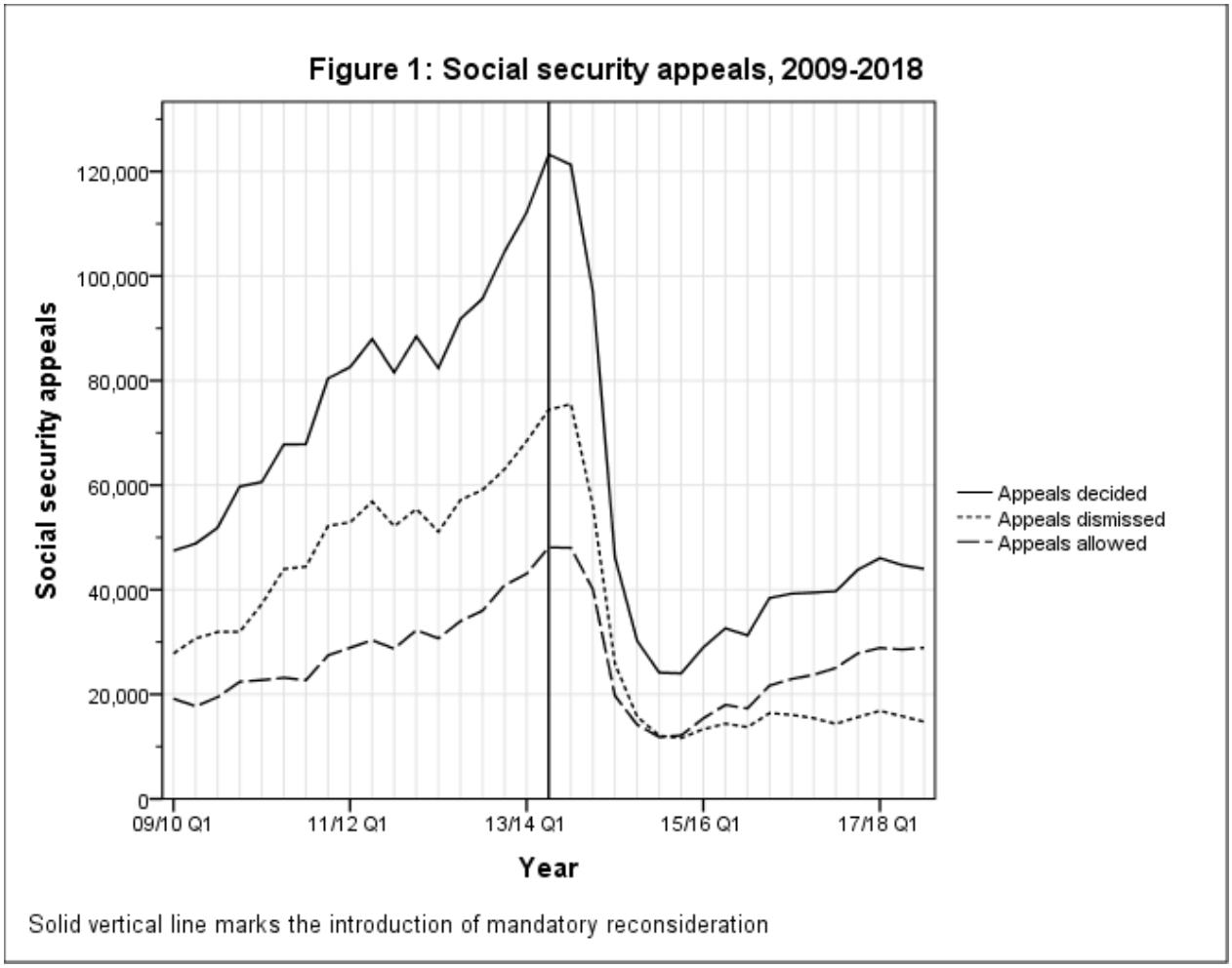
least in its present form, the development of administrative review represents a significant deterioration in the quality of administrative justice system.

Placed within the wider context of the UK's constitutional arrangements, the tale of administrative review told here offer a contrasting narrative to that at the centre of recent debates on judicial power and the separation of powers. This is a tale of de-judicialisation at a time when the dominant focus is on the expansion of judicial power that is placed in the hands of an elite class of judge. The growth of administrative review and the corresponding displacement of tribunals is highlight how some parts of the judiciary occupy a positon that is liable to being heavily affected by economic and policy changes.

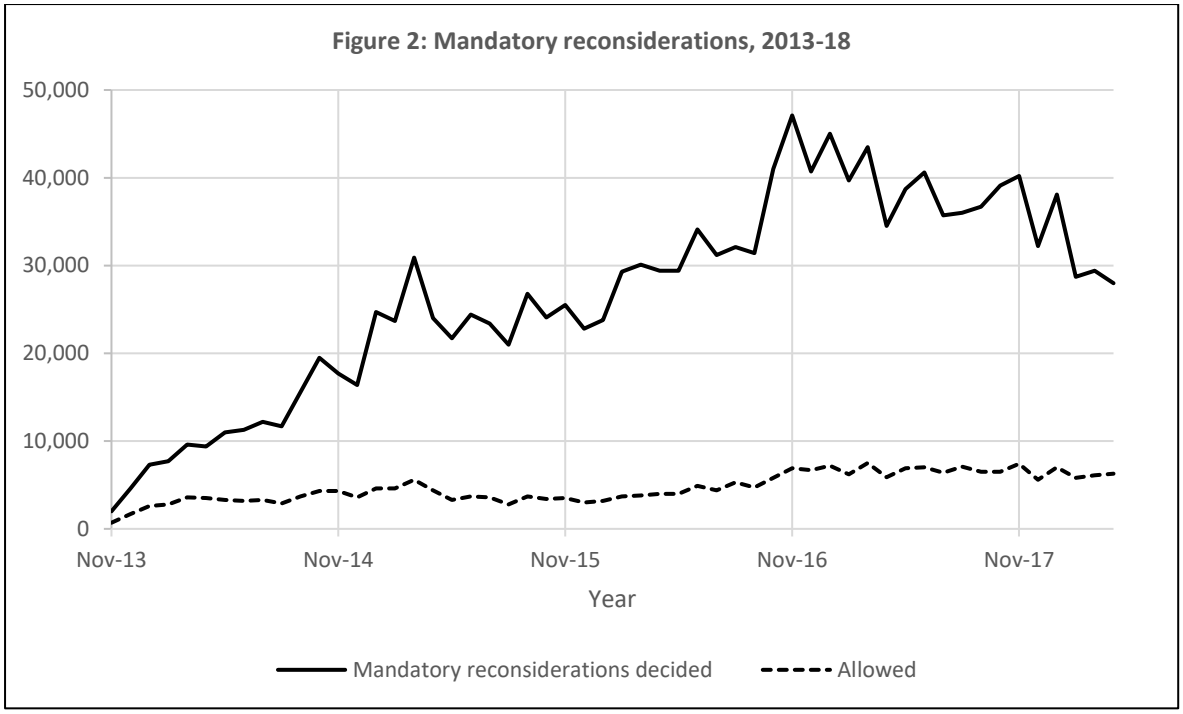
A final, forward-looking word is needed on the digital transformation programme being implemented by the Ministry of Justice and the status of administrative review in light of those reforms.[137] The board intention is to transform tribunals by making them digital by default, in order to improve both efficiency and access to justice. In the social security context, physical tribunal hearings are to be largely, though not fully, replaced by continuous online hearings in which appellants interact with the tribunal through an online messaging service. Appeals handled online would be resolved much more quickly than the current average of 20 weeks. In the immigration context, greater use will be made of video link hearings. With the advent of online tribunal procedures, the distinction between administrative review and tribunal procedures may again be reconsidered: it makes little sense to operate paper-based administrative review procedures while simultaneously introducing online tribunal hearings. There are many questions and concerns about these reforms[138] and reintroducing appeals via a new online approach would likely increase the caseload of tribunals, but doing so would also likely enable swifter and better quality decisions than that currently provided by administrative review. Such a step would follow a logic that pursues the enhancement of

[137] Sir Ernest Ryder, Senior President of Tribunals, 'The Modernisation of Access to Justice in Times of Austerity' (*5th Annual Ryder Lecture*, University of Bolton, 3 March 2016).
[138] R. Thomas and J. Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (Public Law Project and UK Administrative Justice Institute, 2018).

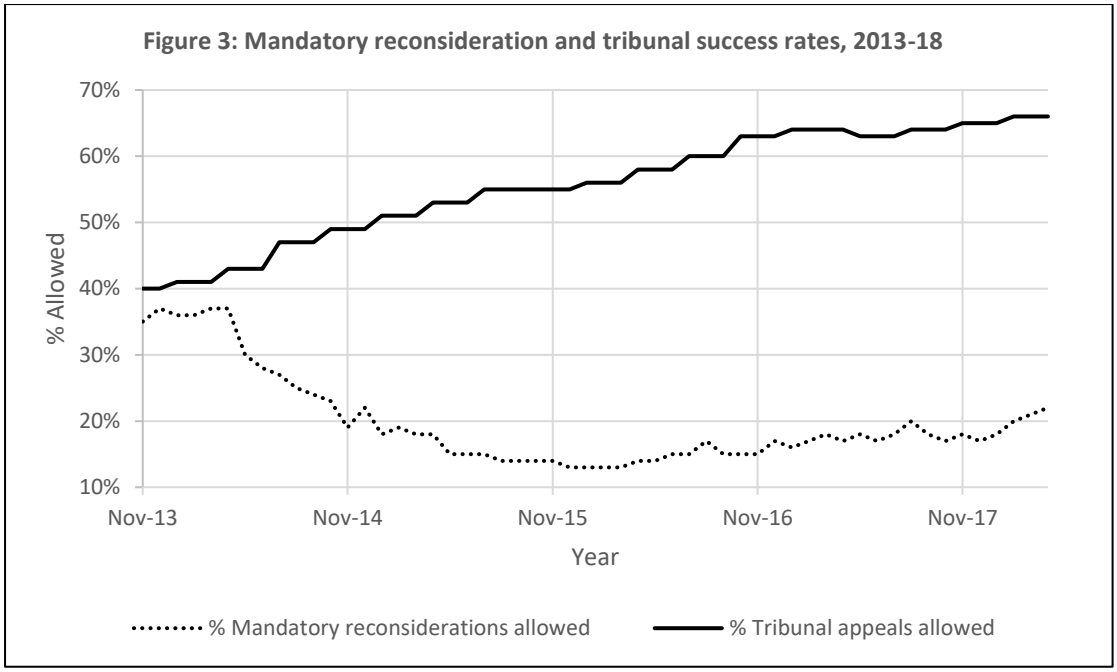
administrative justice. However, as highlighted above, the digitalisation of tribunals is the Ministry of Justice's response to the economic and political circumstances in which its finds itself, while administrative review was the response of other departments—namely, the Home Office and DWP. It would be naïve to suggest the Ministry of Justice ongoing reform project will be the breakthrough moment where a joined-up approach to administrative justice system-design is deployed, when that has not been the case so far. Nevertheless, it does indicate that there is a need to reform the effectiveness of justice processes and this should be focused exclusively on tribunals and courts. Given the increasing prominence of administrative review as either a substitute to or a mandatory stage prior to appeals and the concerns raised, the effectiveness and quality of review processes also require improvement.



Note: this Figure shows the number of social security appeals decided, allowed, and dismissed. Source: Ministry of Justice, *Tribunals and Gender Recognition Statistics Quarterly* (2018).



Note: this figure shows the number of mandatory reconsiderations decided and those allowed in favour of claimants. The data is taken from: Source: DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (2018); DWP, *Personal Independence Payments: Official Statistics* (2018).



Note: this Figure shows the proportion of social security appeals allowed by the First-tier Tribunal (Social Entitlement) Chamber and the proportion of mandatory reconsiderations allowed in favour of claimants.
Sources: DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (2018); DWP, *Personal Independence Payments: Official Statistics* (2018); Ministry of Justice, *Tribunals and Gender Recognition Statistics Quarterly* (2018).